

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| Implementation of State and Local Governments’ |) | WT Docket No. 19-250 |
| Obligation to Approve Certain Wireless Facility |) | RM-11849 |
| Modification Requests Under Section 6409(a) of |) | |
| the Spectrum Act of 2012 |) | |
| |) | |

To: Chiefs, Wireless Telecommunications and Wireline Competition Bureaus

**REPLY COMMENTS OF
AMERICAN TOWER CORPORATION**

American Tower Corporation (“American Tower”) hereby submits reply comments in the above-referenced proceeding,¹ which concerns the Petition for Rulemaking and the Petition for Declaratory Ruling, each separately submitted by the Wireless Infrastructure Association (“WIA”),² and the Petition for Declaratory Ruling filed by CTIA.³

In American Tower’s October 29, 2019 comments in this proceeding (“ATC Comments”), we emphasized the urgent need for the regulatory relief sought in the Petitions relating to compound expansion and interpretations of existing FCC rule provisions relating to

¹ *Wireless Telecommunications Bureau and Wireline Competition Bureau Seek Comment on WIA Petition for Rulemaking, WIA Petition for Declaratory Ruling and CTIA Petition for Declaratory Ruling*, WT Docket No. 19-250, WC Docket No. 17-84, RM-11849, Public Notice, DA 19-913 (rel. Sept. 13, 2019) (“Public Notice”). Because these reply comments exclusively address issues relating to clarifying the implementation of Section 6409(a) (“Section 6409”) of the Middle Class Tax Relief and Job Creation Act of 2012, American Tower is filing in Docket No. 19-250 only.

² Wireless Infrastructure Association Petition for Rulemaking (filed Aug. 27, 2019) (“WIA Rulemaking Petition”); Wireless Infrastructure Association Petition for Declaratory Ruling (filed Aug. 27, 2019) (“WIA Declaratory Ruling Petition,” together with the WIA Rulemaking Petition, the “WIA Petitions”).

³ CTIA Petition for Declaratory Ruling (filed Sept. 6, 2019) (“CTIA Petition,” together with the WIA Petitions, the “Petitions”).

tower concealment elements. Viewing the proceeding's comments as a whole, we find much support for American Tower's positions.⁴ Against that background, these reply comments focus on certain discrete points made in comments of record that are relevant to compound expansion and tower concealment.

Before addressing the material issues, we want to emphasize that, despite claims to the contrary,⁵ the Petitions are appropriate procedural vehicles for accomplishing the desired objectives and do not deprive commenters of reasonable opportunities to provide input. First, by its very nature, the WIA Rulemaking Petition merely seeks initiation of a formal Commission proceeding to adopt new rules, which will require agency explanation of any proposed rule changes and further opportunity for public comment. Second, WIA and CTIA filed their declaratory rulemaking requests pursuant to a Commission rule, 47 C.F.R. § 1.2(a),⁶ specifically designed to allow parties to ask the FCC to "terminat[e] a controversy or remov[e] uncertainty" in the application of existing rules – a safety valve that allows the FCC to adapt to the needs of the evolving, dynamic industries it regulates. The declaratory ruling requests themselves contained the level of detail necessary to give the public a meaningful opportunity to comment

⁴ See, e.g., Comments of AT&T, WT Docket No. 19-250, RM-11849, WC Docket No. 17-84, at 6-8, 29-31 (filed Oct. 29, 2019) (supporting narrowing the scope of the "Concealment Element" and the initiation of a rulemaking process to consider amending the definition of a "site" under Section 1.6100(b)(6) to include the 30-foot buffer) ("AT&T Comments"); Comments of T-Mobile USA, Inc., WT Docket No. 19-250, RM-11849, WC Docket No. 17-84, at 7-11 (filed Oct. 29, 2019) (supporting clarification of concealment elements to mean only a stealth facility or those aspects of a design intended to disguise the facility's appearance); Comments of Nokia, WT Docket No. 19-250, RM-11849, at 6-7, 8-9 (filed Oct. 29, 2019) (supporting a rulemaking to clarify that limited compound expansions – within 30 feet of a tower site – qualify for relief under Section 6409, and supporting the Petitions' request for clarification regarding ambiguities and misinterpretations of the rules surrounding concealment features).

⁵ See Comments of The National League of Cities, et al., WT Docket No. 19-250, et al., at 2-3 (filed Oct. 29, 2019) ("NLC Comments").

⁶ This rule is in turn premised on mirroring language in a provision of the Administrative Procedure Act, 5 U.S.C. § 554(e).

on the relief sought, an opportunity that has indeed been taken by the pool of commenters. Thus, consistent with applicable law, the WIA Rulemaking Petition and the requests for declaratory ruling have provided sufficient notice and opportunity to comment, and are ripe for consideration by the Commission without needing to clear further procedural hurdles.

I. Compound Expansion

Certain commenters misapprehend the scope of WIA’s request to revise FCC rules to treat compound expansions within a 30-foot buffer zone around existing tower site compound boundaries as eligible facility requests (“EFRs”) subject to Section 6409. That is, commenters complain that WIA’s proposed 30-foot buffer zone should not apply to public rights-of-way (“ROW”).⁷ Such concerns are misplaced. WIA carefully followed existing FCC Rule 1.6100(b)(6) by limiting its requested relief to tower sites located outside the ROW.⁸

More generally, and importantly, we could find no meaningful substantive pushback in the comments against the fundamental ideas that underpin the WIA Rulemaking Petition request for compound expansion relief. That request is, after all, premised on the concept that the FCC’s adoption of a 30-foot expansion buffer zone around existing tower site compound boundaries would reasonably: (1) address expansion realities faced by today’s tower owners and managers; (2) serve the underlying purposes of Section 6409; and (3) facilitate timely deployment of vital

⁷ See, e.g., NLC Comments at 13-14; Comments of The National Association of Telecommunications Officers and Advisors, The United Conference of Mayors and the National Association of Counties, WT Docket No. 19-250, RM-11849, WC Docket No. 17-84, WT Docket No. 17-79, at 15 (filed Oct. 29, 2019) (“NATOA Comments”).

⁸ See WIA Rulemaking Petition at 10 (“[t]he Commission should amend the definition of a site for towers (*other than towers in the public rights-of-way*) to specify...” (emphasis added)). See also Joint Comments of City of San Diego, CA et al, WT Docket No. 19-250, RM-11849, WT Docket No. 17-79, WC Docket No. 17-84, at 53 (filed Oct. 29, 2019) (“City of San Diego Joint Comments”), which acknowledge this point, before going on anyway to dispute the wording of the Public Notice and oppose the extension of compound expansion relief to the ROW.

technology and equipment needed to make the promise of 5G a reality. These factors cogently support issuance of the requested rulemaking.

The need for compound expansion relief has only become more apparent during disasters such as hurricanes, tornadoes, and other natural events. Backup power sources at communications sites could help improve the resiliency of network infrastructure during times of peril. However, new backup power at tower sites often cannot be implemented without attendant compound expansions to accommodate the requisite additional equipment. Grant of the requested compound expansion relief would serve the public interest.

II. Concealment

The need for clarification of the existing rules concerning tower concealment is effectively conceded by the docket's comments considered as a whole. That is, commenters repeatedly lament uncertainties which exist with respect to the determination of what constitutes a concealment element, which supports the need for Commission action to clarify the standards.⁹ As noted above, FCC Rule 1.2 is on the books to address exactly this type of

⁹ Several commenters point out that municipalities' widely varying application of multiple factors in their reviews of concealment efforts introduces inconsistency and confusion into the process. *See, e.g.*, Comments of Competitive Carriers Association, WT Docket No. 19-250, RM-11849, at 7-8 (filed Oct. 29, 2019) (explaining that CCA members have encountered municipalities with "overly broad views" of what constitutes a concealment element); AT&T Comments at 6 (highlighting that localities have "seized on this narrow exception to designate all kinds of modifications, such as changes in height, width, or equipment, as changes to concealment features."). Furthermore, certain commenting localities effectively agree that clarification is needed in this area of regulation. For example, such comments recognize that the determination of whether a change defeats a concealment element depends on a variety of case-by-case factors. *See, e.g.*, NATOA Comments at 9-10 (recognizing that "[m]unicipalities may have relied on all kinds of elements of the original siting request—fencing, landscaping, paint color, materials, etc.—to conceal the wireless equipment without expressly stating that was the purpose."); City of San Diego Joint Comments at 31 (arguing that "[n]ot all circumstances warrant 'invisible' or 'stealth' infrastructure and communities must be able to reasonably decide for themselves the level of concealment appropriate for initial deployment that carries over to future modifications.").

situation by allowing the FCC to quickly respond where private parties have requested clarity on current FCC rules.¹⁰

In an effort to circumscribe the FCC’s flexibility to address the Petitions and the changed circumstances on which they are premised, one commenter prominently relies on the FCC General Counsel’s June 2015 brief in *Montgomery County, Maryland v. FCC*, 811 F.3d 121 (4th Cir. 2015) (“*Montgomery County*”), the appellate case which followed FCC adoption of Section 6409.¹¹ While it is true that counsel representations in agency briefs submitted to a reviewing court are to be made in good faith, the law is clear that such representations do not constitute binding agency precedent. Courts have routinely ruled, for example, that the agency’s General Counsel cannot use a brief to remedy a defect in, or supply a rationale missing from, the agency order under review.¹² Indeed, if appellate briefs were held to carry the weight of agency orders, then representations in those briefs would create binding precedent on the FCC and force the Commissioners to vote on each appellate brief to protect and preserve their ultimate authority. Such a standard would be unreasonable and unworkable for the Commission and create undue confusion among courts.

In any event, reliance on the 2015 General Counsel brief in *Montgomery County* is substantively unavailing. WIA and American Tower are seeking relief from localities’ broad use of elements like tower size as if those elements were concealment elements per se. This tactic leads to irrational locality positions that any changes in tower size or other unspecified elements

¹⁰ 47 C.F.R. § 1.2(a).

¹¹ See, e.g., NLC Comments at, 5-6, 14-15.

¹² See, e.g., *Communications and Control, Inc. v. FCC*, 374 F.3d 1329, 1337 (D.C. Cir. 2004) (“[a]lthough the Commission counsel—before us—proffers a detailed explication of the Commission’s *sub silentio* interpretation, we cannot consider it because it comes too late.”), (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

automatically “defeat” concealment, rendering Section 6409 meaningless and contravening Congressional intent. In this environment, as the Petitions request, the FCC should clarify that at the time of original permitting, there needs to be a clear, fact-based, mutually agreeable record documenting elements, if any, which contribute to a facility’s concealment.¹³ Such an approach is consistent with the language of Section 6409 and the principles of fair notice, providing certainty for infrastructure owners and operators that will allow for more efficient planning and proposal of collocations on existing towers.

The relevant lesson of the *Montgomery County* case for the instant proceeding is found not in the General Counsel’s brief, but in the holding of the 4th Circuit’s precedential opinion which followed briefing and argument. That opinion *affirmed* the FCC’s implementation of Section 6409 as the permissible line-drawing exercise of an expert agency.¹⁴ The conclusion of that reviewing court provides the relevant lens through which the Petitions (and the ATC Comments) should be viewed. For instance, as the ATC Comments made clear, the WIA Rulemaking Petition asks the Commission to adopt a modest, readily identifiable 30-foot compound expansion buffer, and the Petitions seek to reasonably limit concealment analysis to elements that actually contribute to tower concealment. Such revisions and clarifications are firmly rooted in fact and common sense, and an urgent, current need for FCC action has been

¹³ American Tower urges the Commission to avoid chasing hypothetical scenarios intended to illustrate how a particular element (e.g., size) might be germane to concealment. *See, e.g.*, NLC Comments at n.57 and accompanying text. It is very difficult to reliably identify all relevant variables in such scenarios. Adoption of Petitioners’ clarifications to the “defeat concealment” concept will allow for appropriate, real world, case-by-case analysis of those elements which actually contribute to concealment.

¹⁴ *See, e.g., Montgomery County*, 811 F.3d at 133 (“We emphasize the FCC’s interpretation of ‘base station’ is entitled to deference under step two of *Chevron*. It is not enough for Petitioners to argue that a better definition of ‘base station’ would have excluded support structures. Instead, Petitioners have the burden of showing that the FCC’s definition is an unreasonable interpretation of the Spectrum Act. We conclude that Petitioners have failed to carry their burden.”).

established in the Petitions and supporting comments. Their adoption would fit squarely within the reasoning of the opinion of the *Montgomery County* Court.

III. CONCLUSION

For the reasons set forth above and in the ATC Comments, American Tower requests that the Commission grant relief as requested therein.

Respectfully submitted,

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